taining stipulations for separation, though such stipulations themselves are not enforceable, seems the wisest. As long as married people are allowed to live apart by mutual consent, it is a just rule which permits the husband to bind himself, in such circumstances, to support the wife. The law, to be sure, decrees and arranges for separation when it finds cause, but it must be admitted that the parties, if determined upon a separation, can in practice always show adequate cause, and that of this they are in truth the best and final judges. Therefore, when a separation is agreed upon, if it can be quietly arranged out of court, the results seem preferable to those necessarily attendant on the notoriety and scandal of a judicial separation. Public policy certainly demands that marriage itself be not so easily dissolved that it shall come to be lightly entered upon. But in giving effect to separation agreements between parties determined on living apart, the courts in no wise lighten the marriage bonds. They prohibit neither subsequent agreements to live together, nor do they go to the objectionable extreme of the English view by prohibiting attempts of one party to join the other, but merely make valid the husband's agreement to fulfil his marital duty of supporting his wife.

REMEDIES FOR BREACH OF WARRANTY. — Two classes of remedies are almost universally granted in case of breach of warranty; one, in the nature of recoupment, by showing the inferiority of the goods in mitigation of damages, when suit is brought on the contract of sale, *Poulton* v. *Lattimore*, 9 B. & C. 259; the other, a recovery on the warranty itself, either in the form of an independent action, or by means of a counterclaim. *Mondel* v. *Steel*, 8 M. & W. 858; *Underwood* v. *Wolff*, 131 Ill. 425. As the latter remedy includes the former, recoupment is to-day of little practical value except in a few cases, where, through a technicality of pleading, the right to counterclaim has been lost.

A third remedy is available in some jurisdictions — the right to rescind if the goods prove inferior. *Bryant* v. *Isburgh*, 79 Mass. 607. This right is denied in the English courts and in many of the states. 14 HARVARD LAW REVIEW, 327, n. 3. The English rule is followed in a recent Connecticut case where a manufacturer, in fulfilment of an order, sold a machine of the description given, which failed to do properly the work for which it was constructed. *Worcester Manufacturing Co.* v. *Waterbury Brass Co.*, 48 Atl. Rep. 422. It was held that the delivery and acceptance of the machine constituted a waiver of any right to return the goods because of their inferior quality. Inasmuch as the defect in such a case is not discoverable until after delivery and acceptance, this is substantially a denial of the right to rescind.

The English rule is much confused by the distinction attempted between a condition and a warranty. A purchaser may regard a stipulation in a contract of sale as a condition, justifying rescission before he accepts the goods, but after acceptance he can treat the breach of the condition only as a breach of warranty, which is not sufficient ground for repudiating the contract. Sales of Goods Act, § 11, 5, 1. The theory is that after receipt of the goods the buyer, by retaining them, has derived some benefit, and cannot therefore restore the seller to his original position. *Street* v. *Blay*, 2 B. & Ad. 456. Such a tender regard for the seller, who has violated his contract by furnishing an inferior article, seems unjust.

As a matter of fact, moreover, the buyer fails to derive any appreciable benefit, and often, as in the principal case, suffers positive injury through unsuccessful attempts to utilize the article. It would therefore seem more just to hold that the buyer, who can discover the defect only on inspection after acceptance, should not by that acceptance forfeit his right to return the goods and be compelled to retain what must frequently prove to be an article useless for his purposes.

On strict legal theory, as well as on these practical grounds, the right of rescission should be granted. *Optenberg* v. *Skelton*, 85 N. W. Rep. 356 (Wis.). While the warranty in form is collateral, in its essence it is an important part of the contract and a material element of the consideration, for the failure of which the right of rescission should be allowed. It cannot properly be regarded therefore as waived by an acceptance, which is necessary for the purposes of inspection.

THE ADMISSIBILITY OF POST-TESTAMENTARY DECLARATIONS. — A recent decision by the United States Supreme Court is an important addition to the conflict as to when a testator's declarations will be admitted as evidence against the validity of an alleged will. A document was offered as a last will, and to show either forgery or revocation, the testator's unsworn declarations concerning the disposition of his property were offered by those who opposed its probate. The court held such evidence inadmissible unless made so near to the time of its execution as to be a part of the *res gesta*. *Throckmorton* v. *Holt*, 21 Sup. Ct. Rep. 474.

As far as the question of forgery is concerned the decision is in accord with the weight of authority. *Walton* v. *Kendrick*, 122 Mo. 504; *Gordon's Case*, 50 N. J. Eq. 397. In some jurisdictions, however, there is a tendency to admit such evidence under certain circumstances. For instance, in one state, it is admitted not as proof in itself of forgery, but as corroborative of other evidence. *Swope* v. *Donnelly*, 190 Pa. St. 417. In other states, it is admitted to show the state of feeling between the parties merely. *Johnson* v. *Brown*, 51 Texas, 65. These courts argue that this evidence, although dangerous, is often of great probative value and sometimes is the only evidence of the fraud. But this argument goes too far. These declarations come within the rule excluding hearsay, and our law of evidence begins only when we begin to exclude evidence which is logically relevant. The insuperable difficulty is that there is no recognized exception to the rule against hearsay which will cover the case.

With the question of revocation, however, there is more difficulty, as some late American decisions support the admissibility of such declarations for that purpose. *Lane* v. *Hill*, 68 N. H. 275; Steph. Dig. Ev., art. 29. These courts rely mainly upon a comparatively recent English case of very doubtful authority. *Sugden* v. *Lord St. Leonards*, L. R. 1 Pr. Div. 154. That case, which overruled earlier cases, has been looked upon with disfavor in its own jurisdiction. *Woodward* v. *Goulstone*, 11 App. Cases, 469. Moreover, at most, the case stands for this only, that such declarations may be used to corroborate other evidence as to the contents of a lost will. Granting its authority for that proposition, there is nothing to warrant the extension of that doctrine to cases similar to the principal case.

In one set of circumstances, however, a strong argument of admissi-